No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (R. 13–20) is not officially reported. The opinion of the court of appeals (R. 6–10) is reported at 379 F. 2d 211.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1967 (R. 4–5). The petition for a writ of certiorari was filed on September 14, 1967, and was

granted on December 4, 1967, 389 U.S. 969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether amounts a bankrupt employer owes to the trustees of a union retirement and disability fund established under a collective bargaining agreement constitute "wages * * * due to workmen" entitled to a priority pursuant to Section 64a(2) of the Bankruptcy Act.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

> Sec. 64 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 874, and Sec. 1, Act of July 30, 1956, c. 784, 70 Stat. 725]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen * * * [11 U.S.C. 104].

STATEMENT

On January 9, 1963, the A & S Electric Corporation ("A & S") filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. The arrangement was never confirmed and the company was adjudicated a bankrupt on November 6, 1963 (R. 23).

Local 3 of the International Brotherhood of Electrical Workers represented electricians employed by

A & S. Petitioner Joint Industry Board of the Electrical Industry, an unincorporated association, manages, through eight trustees, an annuity fund for the benefit of members of Local 3 (R. 67, par. 2(a)).[1] The Joint Industry Board filed a proof of claim in the Chapter XI proceeding for $10,537.34. Of that sum, $5,114 represents contributions to the annuity plan that became due, but were not paid, during the three months preceding January 9, 1963 (R. 23).

The annuity plan (R. 67), adopted pursuant to a collective bargaining agreement between four contractors' associations and Local 3, makes each union employee a participant in the plan and requires each employer to contribute $4 for each day's work by each participant (R. 67, pars. 5–6). A separate account is maintained on the books for each participant, to which are credited amounts employers pay with respect to that person's work (R. 67, par. 5(b)). All funds, however, are apparently commingled. The trustees have title to all money; no participant, other beneficiary, employer, union, "or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof." (R. 67, par. 9(c).) The trustees are authorized to manage the funds contributed to the plan "in their sole discretion" (R. 67, par. 2(e)), and are liable only for such losses as are "due to their wilful misconduct or fraud." (R. 67, par. 2(g).)

[1] "R. 67, par." refers to the paragraph numbers of the "Annuity Plan of the Electrical Industry," a separately paginated pamphlet attached to p. 67 of the record in this Court.

Only the trustees "have the power to demand, collect and receive Employer payments * * *" (R. 67, par. 9(d)). Although employers' contributions are required (R. 67, par. 5(c)) to "be forwarded weekly to the Trustees within one * * * week after each payroll period," the trustees apparently made no effort to enforce this provision against A & S. The $5,114 claim includes amounts that were as much as 40 workdays overdue (Br. 3–5).[2]

Benefits are payable on five contingencies (R. 67, par. 7): death, retirement, permanent disability, entrance into the Armed Forces, or withdrawal from the New York City electrical industry. Whatever event creates the right to payment, the participant or his beneficiary is entitled to "receive all monies to the account of such Participant, in monthly installments." (R. 67, par. 7(b).) Such monthly payments of principal vary in amount, from the $50 paid to those who withdrew from the trade before January 1, 1965, to $150, which is the monthly payment to electricians who, at the age of 60 or more, retire on or after January 1, 1965.[3] The monthly payments continue at that

[2] "Br." refers to the brief of petitioner Joint Industry Board.

[3] A participant who, before January 1, 1965, became permanently disabled (and had been employed by a contributing employer or available for employment for less than 10 years), ceased permanently to be a participant, or entered the Armed Forces received monthly payments of $50 (R. 67, par. 7(f)(1)). The monthly payment is $60 if any such events occurred on or after January 1, 1965 (R. 67, par. 7(f)(2)). Monthly retirement benefits range from $75 to $150, in $25 steps, depending upon the date of retirement but not length of service. The latter benefits obtain in the case of permanent disability of a

fixed amount until the moneys credited to the participant's account are exhausted.[4] In addition, beneficiaries of those who die while employed or available for employment, or while receiving retirement or disability benefits, receive death benefits which range in total from $500 to $5,000, and which are paid "out of income, if available, in monthly installments" of $125 each.[5] The plan expressly provides that all benefits are non-assignable and immune from attachment, garnishment, or other process of creditors (R. 67, par. 9(f)).

The Joint Industry Board and the trustee in bankruptcy (the other petitioner) stipulated that the $5,114 would be accorded the second priority of "wages * * * due workmen" established in Section 64a(2) of the Bankruptcy Act (R. 24). When the stipulation was submitted for the referee's approval, the United States asserted that the claim was not entitled to priority, and therefore was not superior to the government's fourth priority claim for taxes

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participant who has been employed or was available for employment by a contributing employer for at least 10 years (R. 67, par. 7(d)).

[4] If death occurs before exhaustion of the principal amount, the balance is payable monthly to the participant's designated beneficiary (R. 67, par. 7(f)(3)).

[5] Those who die while working or available for work in the industry receive benefits ranging from $1,000 to $5,000, depending upon the date of death (R. 67, par. 7(a)(1)–(6)). For those dying after retirement, or after a permanent disability following 10 years of service, the death benefit is $500 plus $250 for every year of continuous participation in excess of one year, to a maximum of $3,750 (R. 67, par. 7(e)(2)). Before July 1, 1964, the death benefits were paid at the rate of $100 monthly (R. 67, par. 7(c)).

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totaling $15,587.55 (R. 39).[6] The referee, relying on this Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, denied the claimed priority. The District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit affirmed, each agreeing that allowance of the priority would be inconsistent with *Embassy Restaurant*.

SUMMARY OF ARGUMENT

This case is indistinguishable from, and is fully controlled by, the Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29.

Embassy Restaurant held that amounts owed trustees of a union health and welfare fund are not encompassed by the phrase, "wages * * * due to workmen," which is used in Section 64a(2) of the Bankruptcy Act to define amounts accorded second priority. In the nine years since that decision Congress has not seen fit to overrule the case, notwithstanding the continuing introduction of legislation directed at such a purpose, and the intervening reenactment of Section 64a. In the past, Congress has, in contrast, promptly changed judicial interpretations of Section 64a with which it disagreed. Any change in the rule of *Embassy* would in addition create substantial practical and administrative problems, since claims of employees

[6] The United States later filed claims for priority under Section 64(a)(1) for taxes accruing during the arrangement proceedings of $4,374.85. These claims are conceded to be prior to the annuity-plan contributions. Cf. *Nicholas* v. *United States*, 384 U.S. 678.

and claims of unions stemming from the work of those employees may well exceed the $600 maximum the second priority allows each claimant.

The decision in *Embassy* is the only one consistent with the traditional meaning of "wages * * * due to workmen." It also is the only one consistent with the purpose of that priority—to protect workers who would not otherwise have "a 'protective cushion' against the economic displacement caused by his employer's bankruptcy." 359 U.S. at 33.

There is no warrant for interpreting the phrase "wages * * * due to workmen" through reference to the meaning of the word "wages" in other statutes, such as the National Labor Relations Act and the Internal Revenue Code. Those statutes serve very different purposes than the bankruptcy act, and it is the history and policies of the latter that must determine the meaning of Section 64a(2).

Although there are factual differences between this case and *Embassy,* none of them calls for a different result. While each employee will ultimately receive, at a stipulated monthly rate, repayment of the contributions made on his behalf, enjoyment of the benefits is postponed, except in atypical cases, for a long period. Thus, the amount owed the trustees do not as a general matter offer any present benefits to the employees. Only by fortuity would giving a priority to such contributions help the employee over short-term financial difficulties resulting from an employer's bankruptcy. Here, as in *Embassy,* the contributions

are payable to trustees. The employees have no right to enforce payment, and have minimal rights to police the management of the fund.

ARGUMENT

INTRODUCTION

"The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of a bankrupt's estate among creditors holding just demands * * *."[7] Much of the history of national bankruptcy legislation is concerned with the claims of one class or another of unsecured creditors that "equity" warrants their having a priority status in the distribution of the debtor's estate. Congress and the courts, however, have taken a cautious approach in defining claims that are to have priority over those of the general creditors. "The theme of the Bankruptcy Act is 'equality of distribution' (*Sampsell* v. *Imperial Paper & Color Corp.*); and if one claimant is to be preferred over others, the purpose should be clear from the statute."[8]

Here the critical issue is whether there is a clear statutory mandate to allow the amounts owed to the Joint Industry Board the preferred status. Section 64a(2) of the Bankruptcy Act gives (up to $600) to "wages * * * due to workmen" earned within the three months preceding bankruptcy. In *United States*

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[7] *Kothe* v. *R. C. Taylor Trust*, 280 U.S. 224, 227; see, also, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451, 452; *Sampsell* v. *Imperial Paper Corp.*, 313 U.S. 215, 219.

[8] *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 28–29; see, also, *Carpenter* v. *Wabash Railway Co.*, 309 U.S. 23, 28.

v. *Embassy Restaurant, Inc.*, 359 U.S. 29, this Court held that amounts a bankrupt employer owed the trustees of a union health and welfare fund do not come within this category. The overdue contributions were held neither to be "wages" within the meaning of this statute nor "due to workmen." The Court discerned nothing in the language or legislative history of the statute to suggest that Congress intended Section 64a(2) to deal with anything other than the ordinary matter of back pay owed personally and directly to a workman.

This case, we contend, is indistinguishable from, and is fully controlled by, *Embassy*. The employer contributions here, as the ones there, do not fit traditional concepts of "wages * * * due to workmen" and do not provide any meaningful support to the participating employee during periods of economic distress resulting from an employer's bankruptcy.

Whether *Embassy* controls here is the principal issue petitioners raise; they seek to distinguish the present case on the ground that the pension fund here vests a right to future income in the participant, whereas a greater uncertainty attended the receipt of health and life insurance and the other benefits involved in *Embassy*.

The Joint Industry Board at one point of its brief (Br. 17) seems to urge that *Embassy* was wrongly decided and should be overruled. The *amicus curiae* AFL–CIO plainly so argues. They make no attempt, however, to show that in the nine years since *Embassy* was decided, its rule in any way has endangered the

financial stability or existence of union welfare or pension funds, or has handicapped their growth. Their basic arguments are those that were fully presented but rejected in *Embassy*. For the reasons given below, we believe that *Embassy* was correctly decided, and that, if any change is now to be made, it should be by legislation.

Logically, the question whether *Embassy* should be overruled need not be reached unless it is decided that *Embassy* controls this case. But it seems so clear that none of the grounds upon which petitioner would distinguish *Embassy* is tenable (see Point II, below), that we think it appropriate first to deal with the contention that the case should be overruled.

I. *UNITED STATES v. EMBASSY RESTAURANT, INC.*, WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED

A. CONGRESS HAS BEEN ASKED TO CHANGE THE RESULT OF THAT DECISION, AND HAS NOT DONE SO

United States v. *Embassy Restaurant* has been the rule of decision for nearly a decade. [redacted] In every Congress since that decision, a bill has been introduced to overrule the case. For example, bills introduced in each of the last three Congresses would have amended Section 64a(2) to allow within the second priority "indirect wages," defined to mean:

> Any sum payable by a bankrupt to a trustee, insurance company, or other third party for pension, health insurance, or other benefits for

> a person to whom direct wages have been paid or are payable by the bankrupt.[9]

The introduction of these legislative proposals shows congressional awareness of the issue. In this light, the complete reenactment of Section 64a in 1967[10] takes on special significance. The failure of Congress, then or at any other time, to heed union petitions (see A. C. 6)[11] to add to the second priority amounts due to union health, welfare, and pension funds stands in contrast to the several occasions on which Congress has acted to change the interpreta-

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[9] Identical provisions were offered in H.R. 2076 in the 90th Congress, H.R. 991 in the 89th Congress, and H.R. 1784 in the 88th Congress.

H.R. 66 introduced in the 88th Congress would have amended Section 64a(2) to insert a parenthetical clause, "including any sums due a trustee, insurance company, or other third party for pension, health insurance, or other benefits for such claimant." A somewhat different formulation was offered in a Senate bill, S. 1295, introduced the same year, which called for adding to Section 64a(2) the following:

> [A]nd, further, for the purpose of establishing priority under this clause and for computation of the maximum claim to which priority can be given, payments due to any fund or plan established for the purpose of providing employee benefits, which are based upon hours worked or wages paid, shall, if such payments would qualify as deductible from the employer's gross income under the provisions of the Internal Revenue Code, be deemed to be wages assigned to the fund or plan by the individual employees upon whose service or wages such payments are based; * * *

Bills identical to H.R. 66 of the 88th Congress were introduced in the 86th Congress as H.R. 9831, and the 87th Congress as H.R. 2274. This language found its origin in H.R. 8805, introduced in the 85th Congress the year before the decision in *Embassy*.

[10] See Act of November 28, 1967, P.L. 90–157, 81 Stat. 511.

[11] "A.C." refers to the brief of *amicus curiae* AFL–CIO.

tion that this or another Court has given Section 64a. Congress has done this in four ways.[12] It has also acted to resolve a disagreement among the lower courts as to whether salesmen are entitled to the second priority.[13]

These indications that Congress would have changed *Embassy* if that decision did not correctly implement the legislative will should be enough to sustain it.[14]

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[12] The Act of May 27, 1926, c. 406, Section 15, 44 Stat. 667, overruled the result of *Davis* v. *Pringle*, 268 U.S. 315, that the United States is not a "person" within the meaning of what is now Section 64a(5) of the Bankruptcy Act. The Act of July 7, 1952, c. 579, Section 19, 66 Stat. 426, changed the rule of *In re Goldenberg*, 3 F. Supp. 727 (Pa.); *In re Rosenstein*, 2 F. Supp. 726 (Pa.); and *In re Layman Whitney Assoc. Inc.*, 11 F. Supp. 212 (N.Y.), which disallowed first priority for filing fees paid by persons other than bankrupts in voluntary cases. The same act changed the principle of *In re Columbia Ribbon Co.*, 117 F. 2d 999 (C.A. 3), and *United States* v. *Kelloren*, 119 F. 2d 364 (C.A. 8), that no priorities shall exist within classes of priority under Section 64. The Act of September 25, 1962, Section 8, 76 Stat. 571, overruled the decision of *Guerin* v. *Weil Gotshall & Manges*, 205 F. 2d 302 (C.A. 2), which disallowed first priority expenses of petitioning creditors who obtained an adjudication after a contest.

[13] The Act of July 30, 1956, c. 784, Section 1, 70 Stat. 725, resolved a conflict between *In re Herbert Candy Co.*, 43 F. Supp. 588 (E.D. Pa.), and *Thompson* v. *Kronheim*, 178 F. 2d 477 (C.A. 6), on one side, and *In re Clover Dairies, Inc.*, 42 F. Supp. 1006 (S.D.N.Y.); and *In re Colein*, 18 F. Supp. 848 (S.D.N.Y.), on the other side, as to whether a salesman must be an employee, and not an independent contractor, to qualify for wage priority.

[14] See, *e.g.*, *Missouri* v. *Ross*, 299 U.S. 72, 75 (declining to change rule of *New Jersey* v. *Anderson*, 203 U.S. 483, 489, that all tax claims are of equal rank under Section 64a); *Canada Packers* v. *A.T. & S.F.R. Co.*, 385 U.S. 182, 184; *Reed* v. *The Yaka*, 373 U.S. 410, 414; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449–450.

The present case is entirely dissimilar to *Helvering* v. *Hal-*

There are, however, other, highly practical reasons for leaving to Congress the decision of the question whether claims for union welfare and pension funds should be entitled to a priority and how that priority should be related to the traditional wage claims within the present second priority. The statute limits the second priority to "$600 to each claimant." It may well occur that an employee's claim, together with the claims of a union fund with respect to the employee's wages, exceeds that amount. Each cannot be allowed in full. Nor is there a statutory basis for allowing the employee's claim to come ahead of the union's, and still give the latter the priority. Presumably they must share proportionally. Thus, if a workman claims $600, and his union $200 on the workman's "account," the result would be to reduce the workman's maximum priority recovery to $450—three-fourths of the amount Congress had in mind. Even if the combined claims of employee and union under the second priority do not exceed $600 for each employee, "in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share

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lock, 309 U.S. 106, where there was no indication that Congress was aware of the Court's earlier decision. Nor is this a case like *Girouard* v. *United States*, 328 U.S. 61, where a later-enacted statute was inconsistent with an earlier decision. Contrary to petitioner's suggestion (Br. 18), the Welfare and Pension Plans Disclosure Act—the principal provisions of which were enacted before the decision in *Embassy*, 72 Stat. 997 (1958)—was not at all concerned with the impact of an employer's bankruptcy on pension and welfare funds. Its focus was the possibility of mismanagement by the trustees or officers of such funds. See S. Rep. No. 1440, 85th Cong., 2d Sess., p. 19.

with the [union] * * * plan, thus reducing his own recovery." *Embassy Restaurant*, 359 U.S. 33–34.

It does not resolve these difficulties to assert, as petitioners do (Br. 17), that the problems are theoretical. The very circumstance of this case indicates the real and practical degree of the problems. The claims here relate to the pension accounts the Joint Industry Board maintains for 39 electricians.[15] In 18 instances, the accrued pension contributions were $172 or more,[16] with the highest two being $204. Data collected by the Department of Labor suggest that the average union wage in this particular industry exceeds $5 an hour.[17] The employees concerned in this case apparently were earning as much as $50 a day at the time A & S filed its Chapter XI petition. See 49 L.R.R.M. 6; New York Times, January 19, 1962, p. 1, col. 4. Other highly compensated trades do not receive significantly less.[18] Even assuming, as petitioners contend (Br. 17), that "[n]o employer in the construction field could long continue operations without meeting the payroll reg-

[15] Although petitioners list 40 union members, no amount is shown with respect to one, who is described as "Terminated" (Br. 4).

[16] In 29 instances $100 or more was overdue.

[17] See the press release of the Bureau of Labor Statistics, No. USDL: 8561, dated February 8, 1968, which reports that union electricians in cities of population of more than 100,000 receive, apart from overtime, an average hourly compensation of $5.24. See, also, *Union Wages and Hours: Building Trades* (U.S. Dept. of Labor Bull. No. 1547, July 1, 1966), at p. 34, reporting that journeymen electricians were on that date receiving, in New York City, $5.32 hourly, again ignoring overtime.

[18] See authorities cited in fn. 17, *supra*.

ularly," missing but a single weekly payroll would mean that each employee would have an accrued wage claim of $200 or more. Thus back salary for as few as eight work days together with pension claims of the magnitude presented in this suit would accrue a claim that approaches the $600 limit.

The fact that no employee's wage claims were presented in this case (Br. 17) has no bearing on whether there might be claims in other cases. Certainly the courts should not presume from the record in one case that such claims are infrequent in occurrence or insignificant in amount. For example, in fiscal 1966 about $2,000,000—or about 2 percent of the total paid out in bankruptcy proceedings—was received by employees having a second priority.[19]

If, however, petitioners are correct in their speculation that workmen's claims are, as a practical matter, *de minimis* in amount, addition to the second priority of such claims as petitioners present would substantially change the character of distribution in bankrupt estates. If the amount distributed annually under the second priority was substantially increased by allowing this priority to welfare and pension funds, the percentage of the estates available for subordinate priority and general creditors would be accordingly reduced. This would not be consistent with the basic policy decision that Congress must have made in de-

[19] See *Tables of Bankruptcy Statistics*, Report of the Administrative Office of the United States Courts for the Year Ending June 30, 1966, at Table F5. The data do not indicate how many employees shared in the $2,000,000.

ciding how to structure the priorities in order to be fair to all claimants.

There are, necessarily, many uncertainties in attempting to predict the practical effect of allowing petitioner's claim within the second priority. The judicial fact-finding process, directed as it is to the issues of a particular case, is ill-suited for an inquiry into the precise nature of the effect of a change in the *Embassy* rule. Congress is better able than the courts to determine the present needs of workmen as compared to the demands of union welfare and pension funds, and the needs of these funds as compared to those of creditors having a subordinate or no priority.[20]

B. CONGRESS INTENDED TO GIVE IN SECTION 64a(2) A SECOND PRIORITY IN BANKRUPTCY TO SUMS THAT OFFER EMPLOYEES IMMEDIATE AND DIRECT ASSISTANCE IN DEALING WITH SHORT-TERM, ECONOMIC DISPLACEMENTS RESULTING FROM AN EMPLOYER'S BANKRUPTCY

Embassy Restaurant correctly decided that employer contributions owed to union welfare and pension funds should not be accorded a second priority in

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[20] The propriety of legislative rather than judicial consideration of whether the law should be changed is reflected by two features of the recent bills that have been introduced to overrule *Embassy Restaurant*. First, they would have increased from $600 to $2,000 the total amount allowed to each second-priority claimant. Second, those bills would *not* have treated the claims of union pension and welfare funds on a par with those of workmen. They instead provided that if the total claims of the workman and the welfare or pension fund exceeded the proposed $2000 limitation, then the priority of the latter should be limited to "the excess, if any, of $2000 over the direct wage claims." See H.R. 2076, 90th Cong., 1st Sess.; H.R. 991, 89th Cong., 1st Sess., H.R. 1784, 88th Cong., 1st Sess. Compare *Commissioner* v. *Brown*, 380 U.S. 563, 578–579.

bankruptcy. That decision effectuated the congressional intent, reflected in a century of history of bankruptcy legislation, to restrict the phrase "wages * * * due to workmen" to the usual and traditional concept of amounts owed directly to employees for their present use and benefit.

The Act of August 19, 1841, c. 9, 5 Stat. 440, was the first statutory use of the words "wages" and "due to" in formulating a priority for amounts owed employees. Section 5 of that Act gave a third priority to "wages," up to $25, "due to" "any person who shall have performed any labor as an operative in the service of any bankrupt * * *." The same formulation—giving a priority to a limited amount of "wages" that are "due to" employees for services performed in some period immediately prior to bankruptcy—was included in all succeeding bankruptcy legislation. Thus, Section 28 of the Act of March 2, 1867, c. 176, 14 Stat. 517, gave fourth priority to:

> wages due to any operative, clerk or house servant, to an amount not exceeding fifty dollars for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

The Bankruptcy Act of 1898, the present Bankruptcy Act, accorded a specific priority to (30 Stat. 544, c. 541, Sec. 64b):

> wages due to workmen, clerks, or servants, which had been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant * * *.

In 1906, "traveling or city salesmen" were added to the types of employees entitled to priority; see Act of June 15, 1906, c. 3333, 34 Stat. 267.

In 1926, the maximum wage claim was increased from $300 to $600, see Section 15 of the Act of May 27, 1926, c. 406, 44 Stat. 662. Wage claims were advanced from a fourth to a second priority—from behind to ahead of taxes—in 1938. Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1. Otherwise, except for an amendment intended to define the word "salesman,"[21] the language has remained unchanged. Thus, the phrase now in Section 64a(2)—"wages * * * due to workmen"—is virtually the same as the formula first used in 1841. The only change in language is the substitution of such words as "workmen," "clerks," "servants," and "salesmen" for the original phrase, "any person who shall have performed any labor as an operative."

These changes modified or at least defined with more precision the class of employees entitled to share in the priority, but they did not extend the priority beyond the particular kind of claim Congress initially sought to protect in 1841. Each formulation of the priority has used the words pertinent to this case—"wages" and "due to"—and nothing indicates that Congress at any time intended the words to have anything other than their ordinary sense of compensation owed directly to employees for services they performed. Any enlargement of the priority beyond this traditional concept of "wages * * * due to workmen"

[21] Act of July 30, 1956, c. 784, 70 Stat. 725, Sec. 1.

must, as this Court held in *Embassy Restaurant,* be based on the policy that underlies Section 64a(2): "the purpose of Congress has constantly been to enable employees displaced by bankruptcy to secure, with promptness, the money directly due to them in back wages, and thus to alleviate in some degree the hardship that unemployment usually brings to workers and their families." 359 U.S. at 32.

The very nature of the employment of the people who are given the statutory priority supports this conclusion. The priority is restricted to a group which tends to depend for its subsistence upon its uninterrupted daily or weekly earnings, and therefore would not have adequate savings or other reserves to fall back upon when discharged upon an employer's business failure.[22] Such people have a limited choice of employment and are not in a position, as a practical matter, to evaluate the employer as a credit risk. Moreover, the priority is limited to wages earned within a specified short period—now three months [23]—

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[22] See, *e.g.*, *Blessing* v. *Blanchard*, 223 Fed. 35, 37 (C.A. 9) (a general manager of a business did not require, and was not entitled to, the priority); *Manly* v. *Wood*, 37 F. 2d 212, 213–214 (C.A. 4); *In re Paradise Catering Corp.*, 36 F. Supp. 974, 975 (S.D.N.Y.) (and actress who was a star and principal in a show was not a "workman" or "servant"); *In re Estey*, 6 F. Supp. 570 (S.D.N.Y.) (a teacher is a professional worker, and not a "workman, clerk, salesman, or servant"); *In re Inland Waterways Inc.*, 71 F. Supp. 134 (D. Minn.); *In re Lawson Electric Co.*, 300 Fed. 736 (S.D.N.Y.).

[23] Although the time periods have varied, Congress—since the inception of wage priority in 1841—has consistently required that the protected wages be earned within a limited period before bankruptcy. Act of August 19, 1841, c. 9, 5 Stat. 440, Sec-

before the commencement of the bankruptcy proceeding, which reflects the idea that to the extent an employee is able to perform services without compensation for a more protracted period he is not likely to require a priority of payment for his support.[24]

Congress could readily have modified the 125-year-old statutory formula, "wages * * * due to workmen" if it intended the priority to cover debts other than those due immediately and directly to employees. As this Court recognized in *Embassy Restaurant*, it is instructive to consider the contrasting congressional treatment of workmen's compensation claims. Taken as an *a priori* matter, there is no fringe benefit that would be more analogous to "wages" than workmen's compensation awards, which are designed to compensate an employee for damages and loss of work he suffers as the result of a job-connected injury or illness. Yet, such claims were not even provable in bankruptcy until 1934, when Congress amended Section 63 so as to allow their proof. See Act of June 7, 1934, c. 424, 48 Stat. 923, Sec. 4(a). Even then Con-

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tion 5 (six months); Act of March 2, 1867, c. 176, 14 Stat. 517, Section 28 (six months); Bankruptcy Act, c. 541, 30 Stat. 544, Section 64 (three months). The parallel provision in Section 17a of the Bankruptcy Act, *infra*, contains a similar time limitation on the discharge of wage claims.

Section 17a(5) was enacted in 1922 in order to supplement the protection afforded workmen under Section 64a(2) by allowing recourse against the bankrupt himself. Act of January 7, 1922, c. 22, 42 Stat. 354. See H. Rep. No. 426, 67th Cong., 1st Sess., and S. Rep. No. 353, 67th Cong., 2d Sess. See also, Debates, 61 Cong. Record 7055.

[24] See *In re Caldwell*, 164 Fed. 515 (Ark.).

gress did not give such claims the same priority as "wages * * * due to workmen." Rather, it gave them a seventh priority, substantially subordinate to the then fourth priority of wage claims. Only four years later, in 1938, Congress eliminated entirely the priority accorded workmen's compensation claims, in the same bill that advanced wage claims to the second priority. See Act of June 22, 1938 c. 575, 52 Stat. 840, Sec. 1.

The central thesis of the *amicus* plea for an overruling of *Embassy Restaurant* is that the word "wages" in Section 64a(2) of the Bankruptcy Act should include any amount that a collective bargaining agreement requires an employer to pay to a union—*i.e.*, that it should have the same meaning as it has in the portion of the National Labor Relations Act that makes "wages" a mandatory subject of bargaining (A.C. 5). But the meaning of the word "wages" here must be determined by reference to the history and policies of the Bankruptcy Act, and not by the interpretation given the word in other statutes with different histories and different aims. As this Court explained in *Nathanson* v. *Labor Board*, 344 U.S. 25, 28–29:

> The contest [in bankruptcy] now is no longer between employees and management but between various classes of creditors. * * * [I]f one claimant is to be preferred over others, the purpose should be clear from the statute. * * *

Were the word "wages" in Section 64a(2) to be defined by canvassing other statutes where it appears, the Labor Act would not be the only point of reference.

For example, the definition in the Internal Revenue Code, 26 U.S. 3401—which, petitioners agree, excludes the amount for which they claim priority (Br. 8)—should be at least as pertinent as that in the Labor Relations Act. Indeed, since the history of Section 64a(2) shows some congressional concern with the relative priority accorded "wages" and "taxes" in bankruptcy, see pages 17–18, *supra,* if resort is to be had to other statutes the definition of the Internal Revenue Code is the more pertinent.

In any event, the *amicus* argument goes too far. Consider, for example, the treatment of union dues that, pursuant to a collective bargaining agreement, are checked off from an employee's wages, but where the employer is adjudicated a bankrupt before paying them over to the union. Under the *amicus'* approach, these amounts would be accorded the second priority of "wages * * * due to workmen." But such amounts cannot fairly be distinguished from income taxes or social security contributions that, as required by statute, similarly are withheld from the employee's weekly wage but are not paid over to the United States before bankruptcy. These amounts and employers' Social Security contributions, have, however, been treated as "taxes" entitled to only a fourth priority. See *Connecticut Motor Lines* v. *United States,* 336 F. 2d 96 (C.A. 3). Were the *amicus* theory to prevail, would the United States then be entitled to assert a second, rather than a fourth, priority for such claims?[25]

[25] The same difficulty obtains in the reliance petitioners (Br. 20), the *amicus* (A.C. 18–19), and the dissent in *Embassy* (359

For these reasons the meaning of the phrase "wages * * * due to workmen" in Section 64a(2) of the Bankruptcy Act cannot be determined except by reference to the history and function of the priority provisions of the Bankruptcy Act itself. Whatever the word may mean in the National Labor Relations Act, in the income tax law, or in other statutes such as the Miller Act,[26] has no relevance for present purposes. And even if these other statutes were thought material, the most that can be said is that the possible inferences from such other legislative materials are at a standoff. They in no way impeach the conclusion of *Embassy* that an employee's receipt of benefits on the basis of contingencies having no relationship to the bankruptcy of the employer does not offer a "protective

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U.S. at 38–39), place on *Shropshire Woodliff & Co.* v. *Bush*, 204 U.S. 186. That case allowed within the second priority amounts a workman had assigned the claimant and that were concededly unpaid "wages" that were "due to" the assignor. If, as has been argued, amounts owed welfare and pension funds are to be considered "assignments" within the rule of *Shropshire*, so should federal taxes on the employee's compensation. The point of distinction is that *Shropshire*, in recognizing the assignee's priority, allows the workman to reduce his claim to cash quickly. No comparable "protective cushion" would be provided by allowing the second priority to the claims of union funds or the tax collector.

[26] Petitioners (Br. 21–22), the *amicus* (A.C. 18), and the dissent in *Embassy* (359 U.S. at 39) rely on *United States* v. *Carter*, 353 U.S. 210, which dealt with the Miller Act. 40 U.S.C. 270–270d. That act allows trustees of a union welfare fund to recover unpaid contributions from the surety on the employer's payment bond. The statutory language is quite different from Section 64a(2) of the Bankruptcy Act. It does not limit recovery to "wages" but allows suits for all claims that are "justly due."

cushion" that gives "support to the workman in periods of financial distress" and they therefore did not perform the function that Congress had in mind in awarding a second priority to "wages * * * due to workmen." See 359 U.S. at 33. The decision in *Embassy* thus correctly implements Section 64a(2) and should not be overruled.

II. THERE IS NO MATERIAL DISTINCTION BETWEEN THIS CASE AND *EMBASSY RESTAURANT*

The contributions to Local 3's annuity plan involved here offer the participant no more of "a 'protective cushion' against the economic displacement caused by his employer's bankruptcy" than did the welfare fund involved in *Embassy*. The objectives of the plan lie in the future, not the present. It is on this basis that such contributions are allowed an exemption from income tax under the Internal Revenue Code and the fund is not subject to tax on its income.

The only "protective cushion" petitioners perceive is the monthly stipend that a participant receives upon becoming unavailable for employment by a New York City contractor. This contingency is not likely to occur often.[27] Nor is it likely to have more than a

[27] Petitioners assert (Br. 15) that 11 of the participants who were once employed by A & S have withdrawn from the industry. This assertion has no foundation in the record. Petitioners offered to the court of appeals a letter to this effect; but there is no indication of when these withdrawals occurred and whether any of them had any relation to A & S's bankruptcy. The only matter of record on this subject is the statement, see petitioners' brief at p. 4, that one participant, G. A. Hester, had "terminated."

coincidental relation to a particular contractor's business failure.

Even if the petitioners were correct in asserting that a significant number of participants secure, by withdrawal from the industry, short-term benefits upon an employer's insolvency, it still would not follow that the objectives of the Bankruptcy Act would be served by allowing the second priority to contributions overdue from the electrician's last employer. So long as the employee has a previous history of employment within Local 3's jurisdiction, he would receive his $50 or $60 each month for several months, with or without such a priority. This is so because the maximum monthly payment of $60 represents only 15 days' work as a participant in the plan. Thus, assuming that the employee has worked for as little as three months for which contributions were made by his employer, there would be enough to pay him the maximum $60 benefit for a period of four months. Had he worked for as little as a year, he would receive the benefits for sixteen months, again without regard to whether the second priority was provided in a case such as this. Moreover, the very structure of Local 3's annuity plan, which requires ten years' service for maximum benefits, contemplates much longer average periods of service by participants in the plan.

Petitioners are equally unable to show that the employer's contributions to the annuity fund are "due to" the participants. In their Statement, petitioners suggest that the individual electricians could have filed claims for these same amounts. The facts,

however, are quite the converse. The annuity plan (R. 67, par. 9(d)) expressly requires that "[a]ll suits and proceedings to recover Employer payments, or to * * * demand or claim in behalf of the Trustees or of the Annuity Fund" may be brought only by the chairman of the trustees, or by any two trustees, including one employer and one union representative.

Thus, as in *Embassy,* contributions are payable to the trustees of a fund, and not to the employees; the employees' rights are severely limited. They do not have standing to sue the employers to compel payment to the trustees. They do not have power to compel the trustees to manage the fund in one way rather than in another.

Local 3, had it wished, could have structured its annuity fund so as to bring amounts owed it closer to the meaning and function of "wages * * * due to workmen." Thus it could have made the employer's contributions payable in the first instance to the employees, with the proviso that the amounts be withheld in the same manner as union dues or federal taxes are withheld. It could equally have made the benefits assignable; it preferred, however, to give the fund the nature of a spendthrift trust. It could have used the fund to provide supplemental unemployment benefits, as has the United Auto Workers, 57 L.R.R.M. 8–9, thus providing to some extent the same short term protection that the second priority in Bankruptcy affords. But the former two courses would have jeopardized the exclusion of such payments from the employee's wages for tax purposes and the latter approach would have subjected the Joint Industry Board to the taxes im-

posed on trusts. See Section 501 of the Internal Revenue Code of 1954.

The union also might have given its members the right to compel payment of overdue employer contributions; perhaps if it had, arrearages would not have accumulated for ten weeks, and this case would not have arisen. And the union, if it had been willing, could have made the trustees more subject to the oversight of the union members; but it chose instead to limit their liability to the greatest extent possible.

Had any of these things been done, some reasoned distinction from *Embassy* might be possible. Had they all been done, *Embassy* probably would not apply. For this case would then be much like *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F. 2d 768, where the Ninth Circuit allowed a second priority to the claims of a union Vacation and Holiday Benefit Fund, contributions to which were placed in savings accounts in the names of individual employees and paid over to them at Christmas and vacation times.

Perhaps a distinction between this case and *Embassy* could be found in the nature of the benefits an employee might expect. Those differences, however, make this an even stronger case for denying priority. In *Embassy,* it was at least possible for an employee to secure short-term benefits from the plan, such as upon the occurrence of illness. Here, the principal benefits are long-term. Even when an early payment results, the second priority would not increase the payments, and thus could not enhance any "protective

cushion." The priority should therefore be denied here, as it was in *Embassy*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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